

¶ 5

A. Defendant's Jury Trial and Sentencing

¶ 6

In February 2002, an Adams County grand jury indicted defendant on (1) unlawful possession with intent to deliver more than 100 grams but less than 400 grams of cocaine, a controlled substance (720 ILCS 570/401(a)(2)(B) (West 2002)) (count I); (2) unlawful possession with intent to deliver more than 15 grams but less than 100 grams of cocaine, a controlled substance (720 ILCS 570/401(a)(2)(A) (West 2002)) (count II); (3) unlawful possession with intent to deliver more than 1 gram but less than 15 grams of cocaine, a controlled substance (720 ILCS 570/401(c)(2) (West 2002)) (count III); and (4) permitting unlawful use of a building (720 ILCS 570/406.1 (West 2002)) (count IV, later renumbered as count III). Count I was alleged to have occurred on November 15, 2001. All the other counts were alleged to have occurred on December 20, 2001. In May 2002, the State dismissed count III and count IV was renumbered as count III, and we refer to the unlawful-use-of-a-building count as count III.

¶ 7

In May 2002, defendant's jury trial was held. The following evidence was presented. Defendant leased a residence in the 1000 block of Chestnut Street in Quincy. On November 15, 2001, police searched defendant's Chestnut Street residence. Defendant was present. Police recovered crack cocaine from the exterior of the premises. On December 19, 2001, police conducted a controlled buy at defendant's residence. Defendant was present. On December 20, 2001, police again searched defendant's residence. Police recovered crack cocaine from the premises. The jury found defendant guilty of counts I, II, and III.

¶ 8

In July 2002, the trial court held a sentencing hearing. During argument, the assistant State's Attorney argued as follows:

"I do want to point out something from the standpoint of

the statutes. 730 ILCS 5/5-8-4(a)(iii) *** talks about concurrent and consecutive sentencings, and it indicates in paragraph (a) that the Court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective. However, it goes on to say, unless, and then if we look at (iii), it talks about a violation of section (a) of section 401 of the Illinois Controlled Substances Act involving a Class X felony amount of [a] controlled substance, in which the event the Court shall enter sentences to run consecutively. Even if this were not the law, I think certainly a good argument could be made that these sentences should run consecutive, but I think this mandates such a consecutive sentence.

* * *

More importantly, Your Honor, I think the major factor in aggravation is a sentence in this case [which] would deter others from committing the same crime, and when I speak of deterring others, I hopefully speak of deterring these people in Chicago and Joliet from coming down to Quincy because they can make more money and because they can operate under a different system free from competition to sell drugs to our community, to the members of our town. Something needs to cry out to those potential people

that if you come down to Quincy, and you do what [defendant] has done, that there's going to be severe consequences."

¶ 9 Defense counsel argued, in relevant part, as follows:

"I asked [a police officer] ***, was this a continuing course of conduct throughout the summer months of 2001, as he indicated it was, and I believe that this would indicate this is a continuing course of conduct as we sit now by the defendant, and there is no substantial change in the nature of the criminal objective, and [the State is] quite correct, it does say unless afterwards. However, it says any sentence, even though it says it can impose consecutive sentence[s], it said any sentence shall run concurrently unless otherwise specified by the Court, which indicates to me that the Court has an option of running these sentences concurrently.

Not only that, the Court has to find that such a term is to run consecutively [if it] is necessary to protect the public from further criminal activity by the defendant ***."

¶ 10 In pronouncing its sentence, the trial court, Judge Mark A. Schuering presiding, reviewed the presentence investigation report and evidence in aggravation and mitigation. The court stated the critical factor in aggravation was the need to deter others, and defendant "came to Quincy to both profit and to poison the people in this community." The court added "[t]hese were[,] in my 16 years[,] the largest number of drugs I've seen. *** I don't know what we can do to stem this tide that we're seeing. I can lock you up for a long time, which I'm compelled to do.

Maybe the message will go out in my locking you up that if other folks similar to you come down, they [(the Quincy community)] can do that." The court announced its sentence as follows:

"The Court would find that imprisonment is necessary. It's one mandated by statute both for the protection of the public and that it would deprecate the seriousness of the offense and be inconsistent with the ends of justice to do otherwise. I would sentence you to a term in the Illinois Department of Corrections on [c]ount [I] for a term of 15 years, to be served consecutively to a term of 25 years on [c]ount [II]. These are a November offense followed by a December offense, and the Court is in agreement under the statute cited by [the assistant State's Attorney] that the sentences in [c]ount [I] and [c]ount [II] are mandatorily to be consecutive or on top of one another. That means 40 years, Mr. Gavin."

Count III was ordered to run concurrently to count II.

¶ 11 B. Defendant's Direct and Postconviction Appeals

¶ 12 Defendant appealed his conviction and argued the State failed to prove him guilty beyond a reasonable doubt of possession with intent to deliver and the evidence was insufficient to support his conviction for unlawful use of a building. In December 2004, this court affirmed defendant's conviction in his direct appeal. *People v. Gavin*, No. 4-02-0571 (Dec. 8, 2004) (unpublished order under Supreme Court Rule 23).

¶ 13 In February 2005, defendant filed a *pro se* petition for postconviction relief (725

ILCS 5/122-1 to 122-8 (West 2004)). In March 2005, the trial court appointed counsel to represent defendant and an amended petition was filed in April 2006. The amended petition alleged (1) defendant was denied effective assistance of counsel at trial and (2) defendant's sentences violated (a) the cruel-and-unusual-punishment clause, (b) the right to due process, (c) equal protection of the laws, and (d) the right to travel. In July 2006, defendant filed a second amended petition for postconviction relief, which (1) incorporated all the allegations in the first amended petition and defendant's *pro se* petition, and (2) added a claim that defendant had been denied effective assistance of counsel in the direct appeal. In October 2006, on the State's motion, the trial court dismissed all of defendant's petitions for postconviction relief. Defendant appealed the court's dismissal of the second amended postconviction petition, arguing the ineffective-assistance-of-counsel claim required an evidentiary hearing. This court affirmed. *People v. Gavin*, No. 4-06-0912 (Aug. 27, 2008) (unpublished order under Supreme Court Rule 23).

¶ 14 In June 2010, defendant filed a *pro se* petition for leave to file a successive postconviction petition. The trial court denied defendant's petition and defendant appealed. On November 9, 2011, this court affirmed. *People v. Gavin*, 2011 IL App (4th) 100637-U.

¶ 15 C. The Instant Proceedings

¶ 16 In May 2012, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401(f) of the Code (735 ILCS 5/2-1401(f) (West 2012)). Defendant argued the sentencing court erred "when it imposed a sentence without statutory authority." He asserted:

"[The] [s]entencing court fail[ed] to make [a] determination
of whether [the] offenses were committed in a part of a single

course of conduct during which there was no substantial change in the nature of the criminal objective and thus [the] Appellate Court would reverse and remand [the] cause for [the] sentencing court to entertain [a] factual question of whether defendant's actions were committed in a single course of conduct."

On June 22, 2012, the trial court, Judge William O. Mays presiding, dismissed defendant's petition *sua sponte*. The court stated any sentencing issue could have been raised in the direct appeal or the postconviction proceedings.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant argues the trial court erred by dismissing his petition for relief from judgment. Defendant asserts section 5-8-4 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-4 (West 2002)) does not authorize imposition of a consecutive sentence because his offenses were part of a single course of conduct. We disagree.

¶ 20 A. Standard of Review

¶ 21 Section 2-1401 of the Code allows for relief from a final judgment more than 30 days after its entry. 735 ILCS 5/2-1401 (West 2012). A party may seek relief beyond section 2-1401's two-year limitation period where the challenged judgment is void. *People v. Harvey*, 196 Ill. 2d 444, 447, 753 N.E.2d 293, 295 (2001); *People v. Thompson*, 209 Ill. 2d 19, 25, 805 N.E.2d 1200, 1203 (2004) ("It is a well-settled principle of law that a void order may be attacked at any time or in any court, either directly or collaterally."). A void sentence is one entered by the court which is not authorized by statute or exceeds the court's inherent powers. *Thompson*, 209 Ill. 2d

at 23, 805 N.E.2d at 1203; *People v. Land*, 304 Ill. App. 3d 169, 174, 710 N.E.2d 471, 474 (1999). This court reviews *de novo* a trial court's dismissal of a section 2-1401 petition requesting relief based on the allegation the sentencing judgment is void. *People v. Vincent*, 226 Ill. 2d 1, 18, 871 N.E.2d 17, 28 (2007).

¶ 22 B. Untimeliness of Defendant's Petition

¶ 23 Defendant filed the instant section 2-1401 petition on May 15, 2012, over nine years after the trial court's sentencing judgment on July 11, 2002. His petition is beyond the two-year statute of limitations for section 2-1401 petitions. See 735 ILCS 5/2-1401(c) (West 2012). He is only entitled to relief if the sentencing judgment is void.

¶ 24 C. Section 5-8-4 of the Unified Code

¶ 25 At the time of the underlying offenses, section 5-8-4 of the Unified Code provided, in pertinent part:

"(a) When multiple sentences of imprisonment are imposed on a defendant at the same time *** the sentences shall run concurrently or consecutively as determined by the court. *** The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless:

(i) one of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe

bodily injury, or

(ii) [the defendant was convicted of certain sex crimes], or

(iii) the defendant was convicted of armed violence based upon the predicate offense of *** a violation of subsection (a) of Section 401 of the Illinois Controlled Substances Act ***.

(b) The court shall not impose a consecutive sentence except as provided for in subsection (a) unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record; ***." 730 ILCS 5/5-8-4(a), (b) (West Supp. 2001) (text of section effective June 28, 2001, to Jan. 1, 2003).

¶ 26 D. Merits of Defendant's Petition

¶ 27 Defendant asserts section 5-8-4(a)(iii) of the Unified Code does not authorize consecutive sentences because, according to defendant, the offenses were part of a single course of conduct. He adds section 5-8-4(b) of the Unified Code does not authorize the sentence because it requires a "triggering offense" of armed violence before the trial court can impose consecutive sentences. The State disagrees the offenses were part of a single course of conduct and points out the one-month time lapse between the offenses. It adds section 5-8-4(b) of the

Unified Code authorizes discretionary consecutive sentences. We agree with the State.

¶ 28 As part of his argument section 5-8-4(a)(iii) of the Unified Code does not authorize consecutive sentences, defendant first contends the fact count I and count II were committed as part of single course of conduct is undisputed. In his reply brief, defendant articulates his argument as follows: "What is important is that the defendant's profit motive did not vary from day-to-day or sale-to-sale. To say that he had a motivation in November that was independent of his motivation in December is to deprive the concept of motivation, and thus, the phrase, 'single course of conduct,' of any meaning." Defendant cites *People v. Davis*, 151 Ill. App. 3d 435, 444, 502 N.E.2d 780, 786 (1986), for his contention "[t]he test for whether particular offenses are part of a single course of conduct is the 'independent motivation test.'" *Davis* is of little value. This court has previously acknowledged *Davis* is limited to its facts and its rationale is called into question. See *People v. Miles*, 217 Ill. App. 3d 393, 409, 577 N.E.2d 477, 487-88 (1991). Defendant misunderstands the distinction between an ongoing criminal enterprise and the "same course of conduct" analysis used to determine if a defendant's conduct supports multiple criminal offenses. Our supreme court has cautioned "a court must not lose sight of the forest for the trees" in determining whether two acts were part of the same course of conduct. *People v. Rodriguez*, 169 Ill. 2d 183, 188, 661 N.E.2d 305, 307 (1996); see also *People v. Sienkiewicz*, 208 Ill. 2d 1, 7-9, 802 N.E.2d 767, 772-73 (2003). Defendant proposes we examine one consideration—his motivation—and ignore everything else in determining whether the offenses were part of the same course of conduct. To use defendant's logic, if a drug dealer was engaged in an ongoing enterprise to sell and distribute drugs for several years, possessing and distributing varying amounts of drugs during this time, he could not receive consecutive

sentences because of his continuing motivation for profit. This is not the law. Moreover, while the record reflects the parties discussed whether defendant's illicit activities were ongoing, the trial court did not expressly find the offenses were part of the same course of conduct.

¶ 29 While defendant is incorrect his offenses were part of the same course of conduct, his broader argument section 5-8-4(a)(iii) of the Unified Code does not authorize a mandatory sentence in this case is more persuasive. During argument, the assistant State's Attorney inartfully argued the trial court should impose consecutive sentences by citing section 5-8-4(a)(iii). It appears he attempted to invoke section 5-8-4(a)(iii) as a way to reference the legislature's decision to require consecutive sentences for some controlled substance offenses. However, he confusingly added he thought this section "mandated" consecutive sentences, but then proceeded to argue the effects to the community as a reason consecutive sentences were proper. As defendant points out, section 5-8-4(a)(iii) requires an armed violence offense which was not present here. Further, section 5-8-4(a)(iii) is only of consequence when the offenses were part of the same course of conduct—which the State did not argue applied. The State's inartful argument is of consequence because, in sentencing defendant, the trial court referenced the State's argument and agreed, based on the statute cited by the State, defendant's sentences were "mandatorily" consecutive.

¶ 30 While section 5-8-4(a) of the Unified Code did not require defendant's sentence to be mandatorily consecutive, defendant is only entitled to relief if his sentences are void. As the State points out, section 5-8-4(b) of the Unified Code permits discretionary consecutive sentences and to affirm such a sentence, what is required is for " 'the record [to] show that the sentencing court is of the opinion that a consecutive term is necessary for the protection of the

public.' " *People v. Hicks*, 101 Ill. 2d 366, 375, 462 N.E.2d 473, 477 (1984) (quoting *People v. Pittman*, 93 Ill. 2d 169, 178, 442 N.E.2d 836, 840 (1982)). In *Land*, the defendant made a similar argument and asserted his consecutive sentences were void because the sentencing court erroneously imposed consecutive sentences under the belief section 5-8-4(a) of the Unified Code required it to do so. *Land*, 304 Ill. App. 3d at 173-74, 710 N.E.2d at 473-74. This court rejected this argument and stated "the trial court, within its discretion, *could have imposed* consecutive sentences pursuant to section 5-8-4(b) of the [Unified] Code had it believed such sentences were necessary to protect the public." (Emphasis in original.) *Id.* at 174, 710 N.E.2d at 474. The record in *Land* supported the conclusion the trial court would have imposed consecutive sentences even absent its erroneous belief such sentences were mandatory. *Id.* at 171, 710 N.E.2d at 472; *People v. Pinkston*, 2013 IL App (4th) 111147, ¶ 17, 989 N.E.2d 298 (discussing *Land*). See also *People v. Petrenko*, 237 Ill. 2d 490, 505, 931 N.E.2d 1198, 1207 (2010) (rejecting the defendant's claim his consecutive sentences were void where there was nothing in the Unified Code or supreme court jurisprudence "that in any way prohibits consecutive sentencing"). Here, section 5-8-4(b) authorized the trial court to impose discretionary consecutive sentences. The record reflects the court thoroughly expressed its opinion a "lengthy" sentence would protect the community from defendant's criminal conduct and a consecutive sentence would achieve this objective. Defendant's sentences are not void and his section 2-1401 petition is untimely.

¶ 31

III. CONCLUSION

¶ 32 We affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 33 Affirmed.